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Constitutionality of Special Military Court-Martial Where Defense Counsel Is Not a Lawyer (Recent Developments)

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a prohibition case which stated: "If, when one case has been tried, the entire panel of jurors sitting therein is disqualified from sitting as jurors in every other case of a similar sort, trial courts will be so far impeded in the transaction of their business as to make enforcement of this act difficult, if not impossible."[34]

It is submitted that the questionable objection of trial expediency is not of sufficient import to merit proceeding to trial where fairness of the jury is questioned. Conceding that the mere circumstance that a juror has served and participated previously in the determination of a similar case, need not disqualify him from jury service in subsequent actions relating to comparable issues in the same category, it would seem that the "orderly transaction of business" would not require the trial of similar violations with identical witnesses consecutively before the same jury panel, particularly where the offense charged is one toward which there is a pattern of deep and bitter prejudice throughout the community. Moreover there is even less reason for the practice in federal courts, since they have a much larger population from which to select jurors than do the state courts which, paradoxically, disqualify jurors from service under the present facts. Indeed some states, including two of the smaller states, disqualify jurors by statute if they have previously served within a proscribed period of time[35] and even beyond the proscribed period if the facts are identical, regardless of whether identical witnesses are involved.[36]

Thus the decision in the instant case seems wrong in theory and unfortunate in its effect. The reliance on the *Wilkes* decision and the basis for rejection of the "totality of facts" approach appear to exalt supposition over reality. As pointed out by the dissenting opinion:[37]

> It seems improbable that any average man or woman, who has been subjected to the preponderance of guilt, such as these jurors, both collectively and individually would be capable of searching the state of their minds for evidence of bias.

H. W.

MILITARY LAW—CONSTITUTIONALITY OF SPECIAL MILITARY COURT-MARTIAL WHERE DEFENSE COUNSEL IS NOT A LAWYER.—Culp, a student at the Naval Preparatory School in the Bainbridge Naval Training Center, was convicted in a special court-martial of stealing small sums of money from others at the base. Neither the prosecutor nor the defense counsel was a lawyer. Culp was given a bad conduct discharge and sentenced to four months in the

34 Accord, State v. Mays, supra note 21; State v. McMillan, 154 Wash. 29, 280 P. 737 (1929).

35 Me. R.S. 116, § 4 (4 years); R.I.G.I. 1956 § 9-1-7 (two years). See generally Note, The Qualifications and Competence Required for Jury Duty in New England, 41 B.U.L. Rev. 232 (1961).

36 Brewer v. Inhabitants of Tyringham, 31 Mass. (14 Pick.) 196 (1833); McDonough v. Blossom, 109 Me. 141, 83, 323 (1912).

37 Casias v. United States, supra note 1, at 621.

brig, forfeiting $50 a month in pay for four months. The conviction was reversed by a Navy Board of Review which ruled that the special court-martial was a judicial proceeding subject to the Sixth Amendment and that there was no indication on the record that Culp "competently and intelligently waived" his right to qualified counsel. On appeal *Held*: The Constitution of the United States does not require that an accused be represented before a special court-martial by a qualified attorney.[1]

The right to counsel in Federal criminal prosecutions has long been established,[2] and the right to assistance of counsel in state prosecutions for capital offenses was found to be required by the due process clause of the Fourteenth Amendment.[3] The right to counsel in state prosecutions for non-capital offenses was long debated[4] but it is now established that the right of one charged with crime to counsel is "fundamental and essential to fair trials."[5] The United States Supreme Court has given no indication that the fact that the crime is a misdemeanor rather than a felony in any way limits the right to be represented by counsel.[6]

The language of the Supreme Court in decisions dealing with the right to counsel makes it clear that the right established is that of representation by a trained lawyer.[7]

The purpose of the requirement of counsel is to insure that the protections of both substantive and procedural law are available to the defendant.[8]

The grant of power to the Congress to "make rules for the government and regulation of the land and naval forces"[9] has resulted in some debate about the degree to which the imperatives of the Bill of Rights apply to active military personnel.[10] It has been said that "as yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials."[11] It has also been held that military law is a jurisprudence which exists separate and apart from the law which governs the operation of the federal judiciary.[12] Nonetheless, military courts, like the State Courts, have the responsibility to protect a person from a violation of his constitutional rights.[13]

The Court of Military Appeals[14] has indicated that the protections of the

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[1] United States v. Culp, 14 U.S.C.M.A. 199 (1963).

[2] Johnson v. Zerbst, 304 U.S. 458 (1938).

[3] Powell v. Alabama, 287 U.S. 45 (1932).

[4] See, e.g., Betts v. Brady, 316 U.S. 455 (1947).

[5] Gideon v. Wainwright, 372 U.S. 335 (1963).

[6] See Gideon v. Wainwright, supra at 349; Carnley v. Cochran, 369 U.S. 506, at 520.

[7] Gideon v. Wainwright, supra at 344; Powell v. Alabama, supra at 68-69.

[8] See Willis v. Hunter, 166 F.2d 721, 723 (CA 10 Cir. 1943); Powell v. Alabama, supra; Johnson v. Zerbst, supra.

[9] U.S. Const., art. I, § 8, cl. 14. See Burns v. Wilson, 346 U.S. 137, 140 (1953); Dynes v. Hoover, 61 U.S. (20 How.) 15 (1858).

[10] United States v. Clay, 1 U.S.C.M.A. 74 (1951); United States v. Sutton, 3 U.S.C.M.A. 220 (1953); United States v. Jacoby, 11 U.S.C.M.A. 428 (1960).

[11] Reid v. Covert, 354 U.S. 1, 37 (1957).

[12] Burns v. Wilson, supra note 9; Dynes v. Hoover, supra note 9.

[13] United States v. Clay, supra note 10.

[14] This is the highest appellate court in the military judicial system consisting of three civilian judges appointed by the President of the United States. This court was

Bill of Rights, except where expressly or by necessary implication inapplicable, are available to members of the armed services.[15]

Congress in the comprehensive revision of military law eventuating in the Uniform Code of Military Justice, attempted to provide many of the protections of civilian law to trials by courts-martial. The Court of Military Appeals has held that it will give these statutory provisions the same meaning as has been given to the constitutional provisions.[16] Consequently, a person in the military today is accorded the full privilege against self-incrimination,[17] has the right to compulsory process for witnesses,[18] the right to freedom from unreasonable searches and seizures,[19] is protected against double jeopardy,[20] has the right to due process of law in the sense of essential fairness,[21] and is given considerable freedom of speech within the limitations necessary in military society.[22]

The Uniform Code of Military Justice provides for trial of offenses in three kinds of courts-martial.[23] General courts-martial try serious offenses and may impose sentences of life imprisonment or death.[24] Special courts-martial try offenses in the nature of misdemeanors and minor felonies and may impose a maximum sentence of 6 months in custody, loss of pay, loss of rank and/or a bad conduct discharge.[25] Summary courts-martial try minor offenses, but may not impose a bad conduct discharge nor confinement for more than 30 days.[26]

The Uniform Code of Military Justice provides that counsel shall be appointed for the accused in general and special courts-martial, but makes no provision for counsel in summary courts-martial.[27]

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formed in 1951. See Walker, The United States Court of Military Appeals: A Long Overdue Addition To The Judiciary, 38 A.B.A.J. 567 (1952).

[15] United States v. Jacoby, 11 U.S.C.M.A. 428 (1960).

[16] Ibid.

[17] UCMJ art. 31, 10 U.S.C. § 831 (Supp. V, 1959); see United States v. Jordan, 7 U.S.C.M.A. 452 (1957) (privilege violated by order to submit urine specimen); United States v. Rosanto, 3 U.S.C.M.A. 143 (1953) (violated by order to submit handwriting samples).

[18] UCMJ art. 46, 10 U.S.C. § 846 (Supp. IV, 1958); see United States v. Thornton, 8 U.S.C.M.A. 446 (1957) (reversal for refusal to submit witnesses).

[19] United States v. Ball, 8 U.S.C.M.A. 25 (1957); United States v. DeLeo, 5 U.S.C.M.A. 148 (1954); United States v. Noce, 5 U.S.C.M.A. 715 (1955); United States v. Vierra, 14 U.S.C.M.A. 48 (1963); United States v. Brown, 10 U.S.C.M.A. 482 (1961).

[20] UCMJ art. 44, 10 U.S.C. § 844 (Supp. IV, 1957); see United States v. Schilling, 7 U.S.C.M.A. 482 (1957); United States v. Padilla, 1 U.S.C.M.A. 603 (1952); United States v. Zimmerman, 2 U.S.C.M.A. 12 (1952).

[21] Examples of reversals because of unfairness include United States v. Ballard, 8 U.S.C.M.A. 54 (1958) (law officer protecting prosecution witness); United States v. Richard, 7 U.S.C.M.A. 46 (1956) (disclosure by members of court on "voir dire" prejudicial to accused); United States v. Webb, 8 U.S.C.M.A. 70 (1957) (member of court consulting textbook not in evidence).

[22] See United States v. Voorhees, 4 U.S.C.M.A. 509 (1954).

[23] UCMJ art. 16, 10 U.S.C. § 816 (Supp. IV, 1958).

[24] UCMJ art. 18, 10 U.S.C. § 818 (Supp. IV, 1958).

[25] Supra note 24.

[26] UCMJ art. 20, 10 U.S.C. § 820 (Supp. IV, 1958).

[27] UCMJ art. 38(b), 10 U.S.C. § 838(b) (Supp. V, 1959).

In a general court-martial the prosecutor, defense counsel and judge must be attorneys.[28]

The provision for representation by counsel before special courts-martial is more ambiguous. Article 27(c) of the Uniform Code of Military Justice provides, "In the case of a special court-martial—(1) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and (2) if the trial counsel is a judge advocate, or a law specialist, or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing."

As can be seen from the above provisions the qualification of the trial counsel determines what the defense counsel's qualifications must be except where the accused chooses to retain civilian counsel. It is the responsibility of the convening authority to "detail trial and defense counsel."[29] However, with the exception of the standards imposed by Article 27, there is nothing in the Uniform Code of Military Justice nor the Manual for Courts-Martial which limits the convening authorities' power to appoint trial or defense counsel.

In the hearings on revision of the Uniform Code of Military Justice, the then Judge Advocate General stated the need for prosecuting and defense counsel qualified not only in civilian law, but also in military law.[30] Another witness stated that one of the purposes of the legislation was to eliminate the circumstances in which accused in courts-martial were represented by defense counsel "who did not have the capacity . . . to adequately protect the rights of the accused."[31]

The framers of Article 27(c) were careful to delineate different permissible qualifications and the approximate equivalence of such qualifications. For example, if the prosecutor is a judge advocate the defense counsel must also be a judge advocate. However, as to opposing counsel who do not fall within one of the five enumerated classes the Code is silent about what shall be their equivalent qualifications.[32] For example, it is now permissible to appoint as prosecutor a graduate of an accredited law school not yet admitted to any bar against a defense counsel without any formal legal education.[33]

Prior to the decision in the principal case the Court of Military Appeals had not ruled on the question of whether an accused before a special court-martial had a right to a lawyer as counsel. However, the Court has always insisted that an accused before a general court-martial be represented by an attorney unless he intelligently and competently waives that right.[34] In general courts-martial the court has refused to allow the accused to be represented by

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[28] UCMJ art. 27(b)(1)(2), 10 U.S.C. § 827(b)(1)(2) (Supp. IV, 1958).

[29] UCMJ art. 26(a), 10 U.S.C. § 826(a) (Supp. IV, 1958).

[30] 7 U.S. Cong. Documents, 1942 (1947).

[31] House Armed Services Subcommittee Hearings, 81st Cong., March-April, 1949, at 623.

[32] UCMJ art. 27(c)(1)(2), 10 U.S.C. § 827(c)(1)(2) (Supp. IV, 1958).

[33] Supra note 1.

[34] United States v. Kraskouskas, 9 U.S.C.M.A. 607 (1958) (non-lawyer prohibited from practicing before a general court-martial).

lay counsel, even at his own insistence.[35] The court has also, in general courts-martial, reversed convictions because the accused was denied a qualified attorney during the pre-trial investigation.[36] In *United States v. Tomaszewski*[37] the accused was convicted of larceny by a general court-martial. During the pre-trial investigation the accused requested an attorney but was advised that he was not entitled to one. The Court of Military Appeals reversed the conviction on the ground that the pre-trial investigation operates as a discovery proceeding for the accused, and that it would defeat that purpose if a person unskilled in the requirements of proof, or lacking in knowledge of legal defenses, represented the accused.

The Court of Military Appeals has been no less zealous in protecting the accused from incompetent counsel or inadequate representation, in special courts-martial. In *United States v. Rosenblatt*[38] the accused was convicted by civilian authorities of "trespass less than larceny" and freed on bond. Shortly thereafter, and notwithstanding the civilian prosecution, the accused was charged with wrongful appropriation and sentenced to confinement at hard labor for 2 months and given a bad conduct discharge by a special court-martial. At trial no mention was made by the attorney for the accused of the civilian prosecution. The Court of Military Appeals reversed the conviction. It held that an accused is entitled to a fair hearing and to that end his counsel is bound to present such evidence as is known and is available to him, which would manifestly and materially affect the outcome of the case.

In *United States v. Gardner*,[39] in a trial by special court-martial, the Court of Military Appeals held that the accused's representation by his non-lawyer defense counsel was inadequate as to one specification where it appeared that the prosecution's case with respect to that specification consisted only of a pre-trial statement by the accused, and the defense counsel permitted the accused to take the stand and give testimony which supplied the only independent evidence that the crime alleged had been committed.

In determining whether an accused has been adequately represented the court has used various tests. In *United States v. Parker*[40] where the defense counsel's cross-examination of prosecution witnesses indicated he had not consulted them prior to trial, it was held that the accused had not been adequately represented since answers of the witnesses strengthened rather than weakened the prosecution's case.

The issue in the principal case of whether an accused had a right to be represented by a qualified attorney in a special court-martial was certified to the Court of Military Appeals by the Navy Judge Advocate General after a board of review in that office had set aside Culp's conviction and sentence. The Board of Review found the plea of guilty improvidently entered, that cumulative error was reflected in the record, and that there was denial of the con-

35 Ibid.
36 United States v. Tomaszewski, 8 U.S.C.M.A. 266 (1957).
37 Supra note 36.
38 13 U.S.C.M.A. 28 (1960).
39 9 U.S.C.M.A. 48 (1958).
40 6 U.S.C.M.A. 75 (1955).

stitutional right to be represented by counsel qualified in the law. The issue as the Board of Review saw it was whether Article 27(c) permits the appointment of a non-lawyer as defense counsel. The Court severely criticized the Board of Review for deciding the constitutional issue in this case, and stated early in its opinion that the conviction could be reversed without the necessity of deciding the constitutional issue, because of the numerous errors which appeared in the record.[41] Justice Ferguson began his concurring opinion by saying, "First, I consider the question before us to be moot, for, whether it be answered in the affirmative or in the negative, the action taken will have the effect of affirming the decision of the Board of Review."[42] However, the Court held that Article 27(c) of the Uniform Code of Military Justice permits the appointment of a non-lawyer in special courts-martial.

Although all three Justices in the instant case were of the view that Culp[43] was not denied any constitutional right by not having a qualified attorney, they all expressed dissatisfaction with the fact that a non-lawyer is allowed to represent an accused in a criminal prosecution in a special court-martial.[44]

An important factor in considering the right of a serviceman to counsel at a special court-martial is the great similarity between courts-martial and civilian criminal trials.

Today military courts have the jurisdiction to try cases which are made crimes by congressional enactment.[45] Similarly, the Assimilative Crimes Act[46] permits courts-martial, under Article 134, Uniform Code of Military Justice, to try persons subject to the Code for offenses under the laws of the particular state in which the federal enclave is located.

Although special courts-martial have jurisdiction only over minor offenses, they are empowered to render a bad conduct discharge.[47] A bad conduct discharge adjudged by a special court-martial is sufficiently severe that a sentence to 6 months and 24 days confinement and forfeitures has been held to be less severe than a bad conduct discharge.[48] Therefore, any suggestion that the consequences of a special court-martial conviction are so inconsequential that constitutional protections need not be invoked is without merit.

In justifying its decision, the Court of Military Appeals in the instant case, stated that one of the reasons that an accused's constitutional liberties have not been infringed is that the Uniform Code of Military Justice provides for a system of automatic appeal.[49]

However, as Justice Ferguson pointed out in his concurring opinion in the

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41 Supra note 1, at 203.

42 Supra note 1, at 244.

43 Ibid.

44 Supra note 1.

45 UCMJ art. 134, 10 U.S.C. § 934 (Supp. V, 1959). This article permits prosecution of servicemen for crimes and offenses by enactment of Congress or under authority of Congress and made triable in federal courts.

46 62 Stat. 686 (1948), 18 U.S.C. § 13 (1952).

47 Supra note 25.

48 United States v. Brown, 13 U.S.C.M.A. 333 (1962).

49 Supra note 1, at 242.

instant case, automatic appellate review is not a substitute for utilization of legally trained counsel. In reality there can be no review of errors which do not appear on the record and in many instances non-qualified counsel is lacking in the knowledge of how to establish a good record.[50]

It is submitted that the ruling in this case is inconsistent with the Court's previous rulings on the application of the Bill of Rights to servicemen. This decision seems to be incongruous with the purpose behind the enactment of the Uniform Code of Military Justice, and also inconsistent with the accepted notion in State and Federal courts that counsel trained in law is necessary to assure the accused "due process of law." *Gideon v. Wainwright* and subsequent cases give reason to believe that the Court of Military Appeals will probably reverse its position in a case in which the issue is more clearly presented. If the Court fails to reverse its position, there is every reason to believe that the deprivation of right to counsel is so fundamental an error as to permit the overturning of a special court-martial conviction, secured in the absence of counsel, in a habeas corpus proceeding in a federal court.[51]

J.T.B.

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[50] Supra note 1.

[51] Although direct review of a decision of a court-martial is limited to review by the Court of Military Appeals, a writ of habeas corpus brings before a civil court the issue of the validity of a judgment by the military. UCMJ art. 76, 10 U.S.C. § 876 (Supp. IV, 1958). See Gusik v. Schilder, 340 U.S. 128 (1950).